JAMES KENNETH ENG SIEW GOH

v.

LEE KING ONG

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL WAHAB PATAIL J
[CIVIL SUIT NO: S6-2-1036-2009]
12 MARCH 2009

TORT: *Negligence - Medical negligence - Whether defendant negligent in prescribing Blocadren to asthma patient that led to patient's death - Whether defendant failed to ask patient of asthmatic condition before prescribing Blocadren - Whether patient required to disclose asthmatic condition - Whether evidence led that Blocadren caused patient's death - Whether causation proved*

The plaintiff, on behalf of one Melissa Jane Goh Mei Feng ('deceased') brought an action against the defendant for medical negligence. The facts were that the deceased had sought treatment at the defendant's clinic complaining of a fast pulse rate and hand tremors. The defendant prescribed a beta-blocker known as "Blocadren" and it was the plaintiff's case that after taking the prescribed Blocadren, the deceased suffered breathing difficulties, collapsed, went into a coma and died some months later. The issue was whether the defendant was negligent in prescribing Blocadren to the deceased as she was asthmatic. It was undisputed that Blocadren was a beta-blocker and there was contra-indication to beta-blockers being prescribed to patients with asthma. The plaintiff alleged that the defendant failed to ask the deceased or her mother who was present with her at his clinic on whether the deceased had asthma or was under treatment for asthma. The facts also showed that the deceased was prescribed "Ventolin", "Bricanyl" and "Ativan" by another doctor the day before she had collapsed.

Held (dismissing the plaintiff's claim):

(1) On the evidence of the expert witnesses, the court accepted that Blocadren was prescribed to asthmatic patients where there was relatively little risk, for example, where the asthma was well-controlled. It was also accepted that it was prescribed with caution where there was material risk and the circumstances were such that it was necessary. (para 18)

(2) The deceased had a history of not disclosing she had asthma but more so in relation to employment rather than treatment. The defendant relied upon the answer given to the nurse by the deceased that she had no allergies. If the defendant had asked the deceased whether she had asthma, she could have lied but equally she could have told the truth. (paras 20, 21 & 22)

(3) A patient had a duty to be candid and truthful to the doctor. If the patient was not candid or truthful, the doctor had a complete defence. In the present case, if the deceased had disclosed her asthmatic condition, the defendant could have gone on to determine whether there was a material risk or not to prescribe Blocadren. On the other hand, given that the defendant did not ask the deceased if she had asthma, the issue whether the defendant as the doctor was misled by untruthful answers given or suppression of information by his patient, did not arise except as a flight of fancy. Whether the deceased had in the past suppressed the fact that she had asthma or not, although it was pertinent to note that if there were suppression it was employment-related and not illness-related, was irrelevant for she was not specifically asked if she had asthma. Also, the fact that it was a necessary treatment had little foundation, if any, as the deceased was not asked whether she had asthma. Without knowing whether the deceased had asthma or not, and how often and how serious the attacks were, the defendant could not have considered the risk concerned. (paras 22, 23, 24 & 25)

(4) This was not a case of a professional judgment call by a doctor between different medical practices but a failure to exercise basic professional judgment for not ascertaining basic facts required for the exercise of professional judgment as to prescription. (para 25)

(5) Since it was the defendant who would know what he intended to prescribe, and the possible contra-indications of such prescription to asthma, then it was the defendant who would know if he needed to know if the patient had asthma and the risk involved. The deceased would have no way of knowing of the risk involved even if told she was prescribed Blocadren. (para 27)

(6) There could not be any practice that a patient was assumed not to be asthmatic and that it was unnecessary to ask because the practical effect of that meant that medication could be prescribed without question regardless of possible contra-indications. The deceased and her mother could not be expected to have known that there was a possible contra-indication. (paras 28 & 29)

(7) A prescribing doctor owed a basic duty of care to ask a patient before prescribing any medication for which there was possible contra-indication as to whether the patient had any of the conditions that were contra-indicated, such as allergy, illness, condition or other medication being taken. (para 30)

(8) Since the defendant did not make a professional judgment on whether or not to prescribe Blocraden as he had not known that the deceased had asthma, the defendant's submission that it was necessary to prescribe Blocadren was not well-founded. (paras 31 & 32)

(9) There was no evidence that Blocadren caused or triggered respiratory or asthma attacks. There was also no evidence that the deceased had an allergic reaction to Blocadren. It could not safely be said that the Blocadren triggered the attack that led to her collapse, coma and eventual death. On the evidence, it was probable that the deceased had an asthma attack. (paras 38 & 39)

(10) "Ventolin" was a beta agonist, the effect of which could be blocked by a beta-blocker but it had its side effects. Many of its side effects were the same symptoms the deceased had as told by her mother. It raised the unanswered question whether it was something other than Blocadren that was the culprit of the attack. As for "Ativan", it was a prescription for nervousness or anxiety, the very symptoms the deceased's mother noticed that the deceased had the material day. It could repress or depress respiration as testified by the doctor who had prescribed it to the deceased the day before. While 10 tablets were prescribed, only 8 were accounted for. Although the deceased's mother had advised her not to take the Ativan, it could not be ruled out that she had not taken one in the circumstances. It followed that there was no evidence to link any particular medication that led to the deceased's condition of severe breathing difficulty. (paras 40, 41, 42 & 43)

(11) There were no medical records before the deceased's death to show that it was Blocadren or other medication that caused her death. There was also no evidence that the deceased tried using Ventolin for her asthma after taking Blocadren to conclude, on a balance of probabilities, that it was Blocadren that blocked the deceased's medication for asthma. The respiratory difficulties being the result of Ativan could not be ruled out. (paras 44, 45 & 46)

Case(s) referred to:
Bolam v. Friern Hospital Management Committee [1957] 2 All ER 118 ***(refd)***
Bolitho v. City and Hackney Health Authority [1997] 4 All ER 771 ***(refd)***
Bolton and Others v. Stone [1951] 1 All ER 1078 ***(refd)***
Foo Fio Na v. Dr Soo Fook Mun & Anor [2007] 1 CLJ 229 FC ***(refd)***

For the plaintiff - Americk Sidhu; M/s Isharidah, Ho, Chong & Menon
For the defendant - PS Ranjan (MS Dhillon with him); M/s PS Ranjan & Co

Reported by Usha Thiagarajah

JUDGMENT

Abdul Wahab Patail J:

[1] This case involves a patient, Melissa Jane Goh Mei Feng ("the deceased"), who had gone to the private medical clinic operated by the defendant Lee King Ong ("the defendant"). The deceased had gone to the defendant's clinic on that day, 28 July 1999 for the first time complaining of a fast pulse rate and hand tremors.

[2] On that day, the defendant prescribed to the deceased a beta-blocker known as "Blocadren". She was given four tablets of Blocadren and was instructed by the defendant to take a quarter of a tablet once or twice, daily. The Blocadren was given for the purpose of slowing down the patient's pulse rate. It is the case for the plaintiff that after the deceased took the prescribed Blocadren at home a couple of hours later, the deceased suffered breathing difficulties, collapsed, was revived at the Pantai Medical Center, but remained in a coma room which she did not recover and died in Dublin some months later.

[3] Having heard the parties on liability, a direction was given on 6 December 2005 to the parties to proceed to the question of quantum. The direction was given considering the nature of the

heads of claim that was relied upon, and to determine if a trial is necessary thereon. Mr PS Ranjan is right that the court had not rendered a decision on liability.

[4] Mr PS Ranjan submitted:

a. On causation of the asthma attack including effect of beta-blockers, Ativan and Blocadren upon an asthmatic person, with references to medical literature on causation;

b. That the deceased had well-controlled asthma, tended to hide the fact she had asthma;

c. The patient's, duty to be candid and truthful with the doctor;

d. That the defendant did not have knowledge that the deceased had asthma;

e. On reasonable foreseeability of damage;

f. That there was no duty in law to warn of the risk of injury arising out of medical treatment unless the risk is a "material" risk.

[5] Mr PS Ranjan concluded his further submission as follows:

156. It is submitted that in the present case, "close scrutiny, evaluation and logical analysis" of the evidence, including the factual, the medical and the expert evidence, shows as follows:

156.1. that the Deceased was not an asthmatic patient at the time that she saw the defendant;

126.2. that, if she was, her asthma was well-controlled and raised no concerns;

156.3. that if she was an asthmatic patient, she had suppressed such history from the defendant and other doctors and had asked no questions about complications arising from her alleged condition;

156.4. that Blocadren may property be given to patients suffering from asthma, especially well-controlled asthma;

156.5. that, if the Deceased was suffering from uncontrolled, asthma, Blocadren may still be prescribed to her but with caution;

156.6. that it was safe enough to advise her to take only a quarter tablet of Blocadren;

156.7. that the risk of the Deceased suffering a violent reaction was too remote and therefore was not a "material risk";

156.8. that if it was a material risk, the defendant's therapeutic, privilege justified withholding a warning of the risk, in view of the Deceased's longstanding untreated condition, and the extreme worry revealed by her mother;

156.9. that the Blocadren did not cause the pleaded damage; and

156.10. that the pleaded damage was not reasonably foreseeable.

157. The claim should be dismissed with costs.

[6] It is trite that to succeed as to liability in actions relying upon negligence as a cause of auction, it is necessary to prove:

(a) Existence of a duty of care;

(b) Breach of that duty of care;

(c) Causation, that the negligent act caused the pleaded damage; and

(d) Foreseeability, that the pleaded damage is reasonably foreseeable.

Existence Of A Duty Of Care

[7] It is not disputed that, the deceased had come to the defendant's clinic to seek medical attention and that, it was given. The duty of care as between a doctor and his patient therefore arose.

Breach Of That Duty Of Care

[8] The disposal of this action was delayed at the request of counsel on the grounds that the issue of the appropriate test to be applied in cases involving medical negligence was before the Court of Appeal and later the Federal Court.

[9] On 6 December 2005 the Federal Court delivered its decision in *Foo Fio Na v. Dr Soo Fook Mun & Anor* [2007] 1 CLJ 229 where the Bolam test, appeared to be rejected. At the same time the Federal Court relied upon *Bolitho v. City and Hackney Health Authority* [1997] 4 All ER 771.

[10] The more correct view is that *Bolam v. Friern Hospital Management Committee* [1957] 2 All ER 118 ("the Bolam test") was distinguished by the Federal Court. The Bolam test was formulated as follows:

> A doctor is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that medical act ... Putting it the other way round, a doctor is not negligent, if he is acting in accordance with such practice merely because there is a body of opinion that takes a contrary view.

[11] The test recognises that a doctor has to exercise professional judgment as to the appropriate treatment, short of which a finding of negligence may be indicated, from what may be different, bodies of medical opinion, and it is therefore not for the court to decide the proper course of treatment.

[12] I bear in mind also that the question whether there was negligence should not be judged with the benefit of hindsight but must be as at the time the action was taken.

[13] The evidence before the court shows that the deceased was asked by the nurse at the reception when her particulars were taken as to whether she had allergies. The nurse had recorded her answer as negative. It is not the plaintiff's case that the nurse had wrongly recorded the answer by the deceased.

[14] After examination of the deceased with her mother present in the consulting room and relying on the answer that the deceased had no allergies, the defendant prescribed Blocadren for her condition.

[15] It is not disputed that Blocadren is a beta-blocker and there is contra-indication to beta-blockers being prescribed to patients with asthma.

[16] The general issue is whether the defendant was negligent in prescribing Blocadren to the deceased.

[17] In seeking to rely upon the Bolam test considerable effort was expended to adduce evidence that there is body of medical practice that Blocadren can and have been prescribed to patients with asthma. That there is such practice has not been contradicted by counsel for the plaintiff.

[18] On the evidence of the expert witnesses before me, I accept that Blocadren is nevertheless prescribed to asthmatic patients where there is relatively little risk for example where the asthma is well-controlled. I would also accept that it is prescribed with caution even if there is material risk, where the circumstances are such that it is necessary.

[19] But the pertinent issue in this case is not about whether Blocadren can be prescribed for the condition complained of by the deceased. It is more basic than that. Scrutiny of the evidence shows that the defendant, intending to prescribe Blocadren, did not ask the deceased's mother who was present, whether the deceased had asthma or was under treatment for asthma. The defendant had relied upon the answer in the negative obtained by his nurse at the reception who had been instructed to ask patients whether they had any allergies. These are in my view two very different questions.

[20] The defendant sought to show that the deceased had a history of not disclosing she had asthma. Great pains were taken by counsel to establish that assertion. It was disputed. I find on the evidence before the court that it shows the deceased may have been reluctant to disclose she had asthma, but it also appears this was more so in relation to employment rather than treatment.

[21] Having considered the testimony before me, I accept that the defendant had relied upon the answer given to the nurse by the deceased that she had no allergies, and the defendant had not asked the deceased or her mother whether the deceased had asthma, let alone whether it was under control or not.

[22] It is true that if the defendant had asked the deceased whether she had asthma, she could have lied, but equally she could have told the truth. A patient has a duty to be candid and be truthful to the doctor. If the patient was not candid or truthful, the defendant would have a complete defence. If she had told the truth the defendant could then have gone on to determine whether there was a material risk or not, and whether in the circumstances it was necessary to take the risk, before prescribing Blocadren.

[23] Given that the defendant did not ask the deceased if she had asthma, the issue whether the defendant as the doctor had been misled by untruthful answers given or suppression of information by his patient, does not arise except as a flight of fancy. Whether the deceased had in the past suppressed the fact she had her asthma or not, although it is pertinent, to note if there were suppression it

was in employment related and not illness related medical examination, is irrelevant for she was not specifically asked if she had asthma.

[24] Since the defendant did not specifically ask the deceased or her mother if the deceased had asthma, the following submission by counsel that it was necessary treatment had little foundation if any on the facts of this case:

> 126. In the present case, the Blocadren was necessary treatment. It could be given even to an asthmatic patient. It did not pose a material risk to the life of the Deceased. Even if it posed a material risk, the defendant's therapeutic privilege justified withholding a warning of risk in the best interests of the patient. The medical evidence shows that the giving of the Blocadren was necessary treatment.

[25] Without knowing if the deceased had asthma or not, and how often and how serious the attacks were, the defendant could not have considered what the risk was and whether the therapeutic need was such the risk should be taken. The submission is therefore futile. It is not a case of a professional judgment-call by a doctor between different medical practice, but a failure of exercise of basic professional judgment since the defendant did not ascertain the basic facts he needed to know before exercising his professional judgment as to the prescription.

[26] I have also considered whether in light of the duty of a patient to be candid and truthful, the deceased should have told the defendant she had asthma, how serious it was, how often and how recent she had it.

[27] Since only the defendant would know what he intended to prescribe, and the possible contra-indications of such prescription, in this case asthma, it is the defendant who would know if he needed to know if the patient had asthma and how real a risk it was. A patient would have no way of knowing even if she was told she was being prescribed Blocadren.

[28] Obviously, there cannot be any practice that a patient is assumed to be not asthmatic and that it is not necessary to ask, because the practical effect of that means that medication can be prescribed without question regardless of possible contra-indications. If there was such a practice, it would establish the argument for medication to be dispensed not by the prescribing doctors but by pharmacists who could became a second line to alert patients of possible contra-indications.

[29] Not knowing what the doctor was going to prescribe and even if the patient did, could not be expected to know the contra-indications, neither the deceased nor her mother could be expected to have known that there was a possible contra-indication where the defendant as a doctor needed to know if she had asthma and if so how serious a risk it was.

[30] It is plain it is a basic duty of care that is owed by a prescribing doctor to ask a patient before prescribing any medication for which there is possible contra-indication, as to whether the patient had any of the conditions that are contra-indicated, such as allergy, illness, condition or other medication being taken.

[31] The result of failure on the part of the defendant to ask the deceased or her mother specifically is that the defendant did not know whether the deceased had asthma at all, let alone well-controlled asthma, such as would defend his prescription of Blocadren. Without discovering that the deceased has asthma, the defendant could not have known how likely the deceased was going to have an attack and if so how serious it would be in order to make a professional judgment whether or not to prescribe Blocadren.

[32] The submission for the defendant that it was necessary to prescribe Blocadren for the deceased's condition is therefore not well founded. Even accepting that the deceased's condition was such that she had to be given medication, it has not been the case for the defendant that there were no alternatives to Blocadren or that any alternative would be subject to the same contra-indications as Blocadren.

[33] In the event, I would hold that the defendant had failed to show that it was necessary to prescribe Blocadren as opposed to some other medication, be it a beta-blocker or non beta-blocker.

[34] If the cause of death is severe asthma attack, I would find for the plaintiff on this issue. If the cause of death were not, then it is irrelevant.

Causation

[35] On the issue of causation, the case for the plaintiff is that the deceased was prescribed Blocadren, a beta-blocker that has the effect of blocking medication prescribed for asthma from performing their desired function, and as a result the deceased died from a severe asthma attack after she had taken a 1/4 tablet of Blocadren as prescribed.

[36] The evidence before the court points to the fact the deceased had a severe respiratory attack. The undisputed description of her actions while being driven to hospital is consistent with the actions of someone struggling to breathe. The deceased collapsed and upon revival remained in a coma until her death. No other cause of death is indicated. Thus, it is safe to conclude that the collapse and coma of the deceased resulted from inability to breathe, consistent with a severe respiratory attack.

[37] The germane question is what was the respiratory attack and what triggered it, or if the respiratory attack occurred of its own, what prevented medication if she had any, from having effect.

[38] There is no evidence that Blocadren itself causes or triggers respiratory or asthma attack. Dr MK Rajakumar (DW5) testified he could not find anything in medical literature regarding Blocadren causing such a condition. Dr I Kuppusamy (DW6), a consultant respiratory physician, gave testimony to similar effect. There is no evidence before the court that the deceased had an allergic reaction to Blocadren. It cannot safely be said therefore that the Blocadren prescribed in this case triggered the attack that led to her collapse, coma and eventual death. If there is almost no known risk the Blocadren could cause a severe allergic reaction, there is no duty to warn the deceased. This question is also irrelevant because there is no evidence it was in fact the Blocadren that caused, the deceased's condition.

[39] The deceased had a history of respiratory problems, specifically asthma. Witness Anne Kerr (PW1) is the mother of the deceased. She said the deceased was first diagnosed with asthma when she was five years old and between then and 1990 the deceased had been to clinics for treatment. On the evidence it is probable the deceased had an asthma attack.

[40] According to PW1, the deceased always carried "Ventolin" She was prescribed "Ventolin", "Bricanyl" and "Ativan" by Dr Jagjit Singh (PW3). Ventolin is a beta agonist, as is Bricanyl. It relaxes the smooth muscle in the airways which allows air to flow in and out of the lungs more easily. It is used to treat or prevent bronchospasm in people with reversible obstructive airway disease. It is also used to prevent exercise-induced bronchospasm. But it has side effects. One is warned to call the doctor when bronchospasm, chest pain, fast, pounding or uneven heart beats, tremor, nervousness, shortness of breath, or high blood pressure occurs after taking Ventolin.

[41] As a beta agonist, its effect could be blocked by a beta-blocker, but Ventolin itself does have the side effects above. Many of these side effects were the very same symptoms PW1 in examination-in-chief testified to as described by her daughter. It does raise the unanswered question whether it is something other than the Blocadren that was the culprit of the attack.

[42] Ativan is prescribed for nervousness or anxiety, the very symptoms PW1 noticed that day. It could repress or depress respiration. This is from the testimony of PW3 who prescribed it to the deceased the day before. I note while ten tablets had been prescribed only eight was accounted for. Although PW1 said she advised her daughter not to take the Ativan, it cannot be ruled out she had not taken one in the circumstances.

[43] According the case notes of PW3, the prescription was given to treat upper respiratory tract infection. He had not diagnosed asthma. There is no dispute that Ventolin and Bricanyl could be given to patients not necessarily suffering from asthma. The logic appears to me to be that these beta-agonists relaxes the muscles of the airways to make breathing easier and therefore, efficacious in asthma as well as respiratory tract problems affecting breathing. But even Dr Damodaran (PW5) would not link straightaway particular medication with what led to her condition of severe breathing difficulty.

[44] No records from the Pantai Medical Center or elsewhere where the deceased was admitted to before her death was tendered to show whether it was Blocadren or other medications that had caused the eventual death, or what actually caused the attack that caused the death.

[45] Further, other than PW1 testimony that the deceased always carried Ventolin, there is no evidence that she had in fact tried to use it after taking the Blocadren that evening in order that one could safely say that upon a balance of probabilities it was the Blocadren that blocked the deceased's medication for asthma, because the respiratory difficulties being the result of Ativan being taken cannot be ruled out.

[46] In the event, I cannot conclude that upon a balance of probabilities it was the Blocadren that prevented medication having effect for the attack suffered by the deceased.

Foreseeability

[47] It was submitted that assuming causation is proven the violent reaction was not reasonably foreseeable at the time that the Blocadren was prescribed. Counsel relied upon *Bolton and Others v. Stone* [1951] 1 All ER 1078. But to my mind, without the defendant finding out whether the deceased had asthma, how serious, how often and how recent she had it, it would be impossible to determine whether what actually occurred, assuming causation was proven, was not foreseeable. I cannot in the circumstances make any conclusion thereon.

[48] The plaintiff's action is, therefore, dismissed with costs.

[49] Mr Americk Sidhu, counsel for the plaintiff had requested for the written judgment to deal with the question of damages. Mr PS Ranjan for the defendant thought it unnecessary. I had considered acceding to Mr. Americk Sidhu's request since after all the parties had submitted upon it. In drafting grounds on damages, I found that it would become necessary to make assumptions generally contrary to the decision above. It would be purely hypothetical. I found I am led to the conclusion that it is not time usefully employed and it serves little if any useful purpose to write upon grounds not necessary for a decision.

[50] In the event, I have decided to leave out my thoughts on the issue of heads of damages.